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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

WALTER BACHOWSKI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-20A) is reported at 502 F.2d 79. The order of the district court (Pet. App. B, p. 21A) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, p. 22A) was entered on July 26, 1974. The pe-

tition for a writ of ceritorari was filed on October 22, 1974, and granted on December 16, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a disappointed union office seeker may invoke the judicial process to compel the Secretary of Labor to bring an action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to set aside a union election.

STATUTES INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. 482, provides in pertinent part:

> (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title * * *. The challenged election shall be presumed valid pending a final decision thereon * * * and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary * * *.

Section 403 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. 483, provides in pertinent part:

> * * * The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

The Administrative Procedure Act, 5 U.S.C. 701 (a), provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

STATEMENT

Respondent Walter Bachowski unsuccessfully sought election as District Director of District 20, United Steelworkers of America. After exhausting his remedies within the union respondent filed a timely complaint with the Secretary of Labor on

June 21, 1973, alleging violations of Section 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Respondent's was one of six complaints filed with the Secretary concerning the conduct of elections for District Directors in the Steelworkers union.

After investigating these complaints the Secretary filed suit to set aside the elections in Districts 15 and 31. The Secretary also undertook an extensive investigation of respondent's complaint, twice receiving from the union extensions of time during which to continue the investigation.[1] The Secretary determined there was not adequate ground to believe that a violation had occurred in the conduct of the election in District 20 that could have affected its outcome, and accordingly notified respondent that he would not commence a suit to set aside the election.

Respondent then brought suit against the Secretary and the union, seeking to compel the Secretary to file an action to set aside the election. His complaint alleged that the union violated Section 401 because some members voted in a manner that made it possible to determine how they voted; that he was denied observers at some polling places; that there was no election in at least one local; and that the incumbent

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[1] These facts are taken from Bachowski's complaint (App. 3-6), from the opinion of the court of appeals, and from information made available to us by the Secretary of Labor. Because the district court dismissed Bachowski's complaint for want of "jurisdiction" (Pet. App. B, p. 21A), all of the factual allegations (although not the legal conclusions) in the complaint must be accepted as correct.

used dues money to aid his reelection (App. 5). The complaint also alleged that the Secretary's investigation had substantiated these charges (*ibid.*).

On November 9, 1973, two days after the complaint was filed (and before the Secretary had an opportunity to file a formal answer), the district court after a short oral argument, dismissed the complaint for lack of "jurisdiction over the subject matter" (Pet. App. B, p. 21A).

The court of appeals reversed. The court reasoned that there is a presumption of reviewability under the Administrative Procedure Act (5 U.S.C. 702) and that all administrative decisions are reviewable unless review is specifically prohibited by 5 U.S.C. 701(a). Because the court of appeals concluded that the Secretary's decision not to challenge the union election was not "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2), it ordered the case remanded to the district court for a hearing [2] to determine whether the Secretary had abused his discretion by failing to file an action to set aside the election.

The court of appeals rejected the government's argument that judicial intervention is foreclosed by the LMRDA, which provides that the Secretary's

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[2] The court of appeals also required the Secretary to furnish to Bachowski a statement of his reasons for not filing an action. We do not contest this portion of the court's holding (see 5 U.S.C. 555(e)). An extensive statement setting out the Secretary's investigative technique and narrating his findings has been submitted to the district court, and is reprinted as an Appendix to this brief, *infra*, pp. 1a-16a.

suit shall be the "exclusive" remedy for the enforcement of Title IV (29 U.S.C. 483). The court apparently thought it persuasive that if the Secretary "wrongfully refuses to file suit, individual union members are left without a remedy" (Pet. App. A, p. 15A).

SUMMARY OF ARGUMENT

Respondent in this case seeks to achieve through indirection what cannot be done directly—the institution of a lawsuit against a labor organization, by one of its members, to set aside an election of officers because of alleged violations of Title IV of the LMRDA.

Under Title IV a suit by the Secretary of Labor is the exclusive post-election remedy for a violation of its provisions. The legislative history of this exclusive suit provision demonstrates that centralization of Title IV enforcement machinery in the Secretary resulted from a deliberate decision to preclude private litigation challenging the results of union elections.

The remedial provisions of Title IV would be enlarged in a manner contrary to the legislative intent by allowing a disappointed union office seeker to sue to compel the Secretary to prosecute his complaint against the union. Title IV was a considered compromise between the desire, on the one hand, to provide union members with a workable guarantee of internal democracy and the benefits, on the other, of insulating the unions from excessive interference in their internal affairs and the need to defend against

unmeritorious post-election suits by disgruntled members. The legislative compromise interposed the Secretary between the union and members complaining about election results; the Secretary evaluates and investigates the complaints, and proceeds against the union only when there is probable cause to believe that violations have occurred and might have affected the outcome of the election, and when attempts to settle the dispute with the union have been unsuccessful. Unlike a member involved in election infighting, the Secretary can make a distinterested judgment with the broader public interest in mind and does not file suit unless the member's complaint probably is meritorious.

If the Secretary's determinations that there is insufficient reason to file suit are opened to challenge, it will be possible to hale the union into court to defend its elections at the behest of any member; this will substantially burden the unions even when the Secretary's decisions are vindicated. Moreover, the filing of a suit against the Secretary will create an unnecessary cloud upon the union election, a cloud that may not be dissipated for much, or even all, of the period until the next election. If the court directs the Secretary to file suit, that suit could come long after the limitations period in Title IV, and unduly delay final resolution of any contest concerning the election. Finally, the possibility that a court could compel the Secretary to bring an action would reduce the incentive of a union to settle any complaint concerning an election, because the Secretary no longer

would be able to promise immunity from suit in return for the settlement.

In light of the legislative purposes reflected in the remedial provisions of Title IV, it is appropriate to conclude that with respect to suits to set aside union elections, the Secretary possesses the same scope of prosecutorial discretion as is entrusted to other administrative agencies charged with prosecuting violations of the statutes they administer—their decisions to prosecute or not to prosecute, unless constitutionally discriminatory, are not subject to judicial review.

ARGUMENT

THE LMRDA PRECLUDES JUDICIAL REVIEW OF THE SECRETARY'S DETERMINATION NOT TO FILE SUIT TO SET ASIDE A UNION ELECTION

Respondent seeks to achieve by indirection what he cannot do directly—to bring a suit at his own behest against a labor organization to set aside an election of officers. Although the immediate relief sought by respondent is the institution of a suit by the Secretary, respondent will not benefit unless that suit is successfully prosecuted and a judgment is entered against the union. Indeed, respondent would undoubtedly exercise his right to intervene in that suit (*Trbovich* v. *United Mine Workers*, 404 U.S. 528) and play a significant role in its prosecution. And, although the suit to compel suit is directed against the Secretary, the union itself was joined and, as a practical matter, required to appear and defend in order to minimize the chance that the district court would compel the Secretary to bring an action. The

union itself is therefore a major party in interest even in the action against the Secretary. Indeed, the injury alleged by respondent stems directly from the actions of the union, rather than from the Secretary's determination not to sue.

We agree with the court of appeals that, ordinarily, final administrative decisions are judicially reviewable and may be set aside if arbitrary or capricious. But the Administrative Procedure Act expressly provides that judicial review of administrative action is not authorized when "statutes preclude judicial review" (5 U.S.C. 701(a)(1)) or when "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). We submit that the LMRDA commits to the sole discretion of the Secretary the decision whether to bring an action to set aside a union election.[3] Section 403 (29 U.S.C. 483) provides that a suit by the Secretary shall be the "exclusive" remedy for a violation by a union of Title IV, and the legislative history of Title IV discloses that the decision whether to invoke this "exclusive" remedy has been entrusted to the Secretary's discretion.

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[3] This is not to suggest that there are no circumstances that might permit judicial review of the Secretary's decision not to bring an action. For example, if the Secretary were to declare that he no longer would enforce Title IV, or otherwise completely abrogate his enforcement responsibilities, judicial review might be appropriate. See *Adams* v. *Richardson*, 480 F.2d 1159 (C.A.D.C.). Similarly, review might be appropriate if the Secretary prosecuted complaints in a constitutionally discriminatory manner. See *Yick Wo* v. *Hopkins*, 118 U.S. 356. However, respondent's sole complaint is that the Secretary has exercised his judgment incorrectly in this case.

A. The Act Authorizes Only Pre-election Private Remedies And Specifies That Suit By The Secretary Shall Be The Exclusive Method Of "Challenging An Election Already Conducted".

The LMRDA carefully distinguishes between public and private remedies. Title I establishes individual and equal rights in union affairs and business, enforceable exclusively by private litigation. Titles II and III govern record keeping, financial disclosure and trusteeships, and provide for both private and public remedies. Title IV controls union elections. Section 401 (29 U.S.C. 481) requires that election be by secret ballot, that union members be allowed to vote without threat or reprisal, that the membership be notified of the election, and that no union dues be used to promote the candidacy of any person. It also gives candidates the right to equal treatment in the distribution of campaign literature and access to membership lists.

Titles I and IV cover partially overlapping ground. Most of the prerequisites of union democracy, such as the right to be a candidate, to nominate candidates, and to participate in elections, are ~~covered~~ by Title I. All of the provisions of Title I may be enforced by a suit by any member of the union, so that general defects in internal organization or procedures are open to pre-election challenge by the membership. Title IV, on the other hand, is directed primarily to abuses that may take place during the election itself. Section 401(c) of that Title (29 U.S.C. 481(c)) authorizes suits by any member to enforce the union's duties to distribute campaign literature without dis-

crimination in favor of an incumbent, and to make available to any candidate a membership list. Once an election has been held, however, any complaints about conduct during that election must be redressed according to the procedures specified in Section 402 (29 U.S.C. 482).

Section 402 provides that a union member who believes that the election was improperly conducted first must exhaust the internal union remedies available to him, or pursue those remedies for three months without obtaining a final decision. He may then, within one calendar month, complain to the Secretary of Labor. The Secretary is directed to "investigate such complaint and, if he finds probable cause to believe that a violation of [Title IV] has occurred and has not been remedied," within 60 days to "bring a civil action against the labor organization * * * to set aside the invalid election * * *." If the district court finds that the union violated Title IV, and that the violation "may have affected the outcome of [the] election," it declares the old election void and orders the union to conduct a new election under the supervision of the Secretary.

Section 403 (29 U.S.C. 483) specifies that "[t]he remedy provided by * * * [Title IV] for challenging an election already conducted shall be exclusive."

B. The Act's Legislative History Shows That Congress Did Not Intend The Secretary's Determinations Whether To Bring Suit To Set Aside Union Elections To Be Subject To Judicial Review.

Before the enactment of the LMRDA in 1959 union members had available (under state law) a few private remedies to ensure fair and democratic union elections. They could, for example, bring suit in state courts to compel union officers to comply with provisions of the union's constitution and bylaws and to require that elections be by secret ballot. Some abuses that might arise in connection with the actual conduct of the election were subject to judicial review in several states. But such lawsuits were expensive and the legal rights varied from state to state.[4]

On May 5, 1958, then Senator John F. Kennedy introduced S. 3751, which had as its basic purpose the establishment of "minimum public standards with respect to the election of union officers." 104 Cong. Rec. 7953-7954. The enforcement provisions of S. 3751, which was an embryonic version of Title IV of the LMRDA, were substantially similar to those in Section 402 as enacted. These enforcement provisions, including the section making suit by the Secretary the exclusive remedy, were incorporated without significant alteration into the more comprehensive Kennedy-Ives Bill, S. 3974, which was introduced on June 10, 1958, and passed by the Senate on June 17, 1958. The accompanying report,

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[4] See Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221 (1961); Remarks of Senator John F. Kennedy, 104 Cong. Rec. 10947.

S. Rep. No. 1684, 85th Cong., 2d Sess., explained that the safeguards of Section 301 of the bill (which became Section 401 of the LMRDA) "are to be enforced by the Secretary of Labor, upon complaint of any union member * * *," and that "private court litigation would be precluded" (*id.* at 13).

S. 3974 was defeated in the House by a narrow margin on August 18, 1958 (104 Cong. Rec. 18288). On January 20, 1959, Senator Kennedy introduced S. 505. Sections 301 and 302, the election and enforcement provisions, were practically identical to those of S. 3974 and retained the provision for exclusive enforcement by the Secretary.

On January 28, 1959, Senator Goldwater introduced S. 748, which was supported by the Eisenhower administration. This bill would have permitted the Secretary to conduct investigations on his own initiative and to bring actions to enforce election safeguards; however, it would have reserved to union members enforcement rights regarding issues not the subject of the Secretary's proceeding, and would have preserved "any existing rights or remedies" to which union members were entitled under state law. The AFL-CIO vigorously opposed the Goldwater bill, arguing that its private enforcement provision would "result in placing union officers in a straitjacket since they could be haled into court, virtually without limitation," to defend against frivolous or harassing suits. Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on Labor-Management Reform Legislation, S. 505,

S. 748, S. 76, S. 1002, S. 1137, and S. 1311, 86th Cong., 1st Sess. 567 (statement of Andrew Biemiller), 580-581 (analysis by Arthur Goldberg). See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 534.

In the course of the hearings on S. 505 and S. 748, Professor Archibald Cox suggested a compromise: until an election was held a member should be permitted to "maintain an action to compel the observance of the constitution and bylaws of a labor organization * * *" (Hearings, *supra*, at 136), but that post-election enforcement should be vested exclusively in the Secretary. Professor Cox explained that exclusively public post-election enforcement would preclude harassment of the union by a multiplicity of suits on the one side and friendly suits aimed at foreclosing the Secretary's action on the other; it would prevent a "crazy quilt of State legislation and court decisions"; and it would "centralize control of the proceedings in the Secretary of Labor." Hearings, *supra*, at 135. See *Trbovich*, *supra*, 404 U.S. at 535. Professor Cox's suggested distinction between pre-election and post-election remedies was accepted by the Senate Subcommittee and is reflected in the Act.

The bill that finally emerged from the Senate Committee was S. 1555, the Kennedy-Ervin Bill, which passed the Senate on April 25, 1959 (105 Cong. Rec. 6745). S. 1555 was accompanied by S. Rep. No. 187, 86th Cong., 1st Sess., which stated (at 21):

> [S]ince the bill provides an effective and expeditious remedy for overthrowing an improperly

held election and holding a new election, the Federal remedy is made the sole remedy and private litigation would be precluded.

Supporters of the Goldwater proposal did not object to placing in the hands of the Secretary exclusive control over suit under Title IV. The minority report from the Senate committee criticized the bill's "gimmicks," but the objections to the provisions that became Sections 402 and 403 concerned the preemption of state law by a uniform national standard, and provisions allowing unions to amend their bylaws to increase the time between elections. S. Rep. No. 187, *supra*, at pp. 93, 101 (minority views). Senator Goldwater prepared a lengthy statement for presentation to the House, explaining the Secretary's power to bring suit and concluding, "So far, so good." 105 Cong. Rec. 10101.[5] By the time S. 1555 was approved by the Senate the Secretary's exclusive post-election enforcement powers had been agreed upon.[6]

On August 13, 1959, the House passed H.R. 8400, which, unlike the Senate bill, permitted union members to bring suits to set aside elections. However,

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[5] In this commentary the Senator expressed continuing doubts about the bill's preemption of state remedies and state laws, and numerous substantive objections to the election provisions. 105 Cong. Rec. 10101-10102.

[6] Earlier, Senator Wiley had expressed concern that the exclusive suit provision of S. 3974 (the Kennedy-Ives bill) would destroy state-created rights of private suit (104 Cong. Rec. 10947; Senator Kennedy responded that private suits were too expensive and time consuming (*ibid.*). An attempt to amend the Kennedy-Ives bill to provide for private suits was defeated. 104 Cong. Rec. 11005.

the Conference Committee (H. Conf. Rep. No. 1147, 86th Cong., 1st Sess.) adopted the enforcement provisions of the Senate bill, which became Title IV of the LMRDA.

Thus, after extensive consideration of the question, Congress adopted the remedial provisions in Title IV that were designed to implement Professor Cox's proposal that "control" of post-election proceedings be centralized in the Secretary.

C. This Court's Decisions Recognize That The Act Vests In The Secretary Conclusive Discretion To Determine Whether To Seek Judicial Review Of Post-Election Complaints.

This Court first considered the role of the Secretary in bringing Title IV actions in *Calhoon* v. *Harvey*, 379 U.S. 134. It there held that individual union members cannot seek judicial enforcement of the rights protected by Title IV. As the Court explained (379 U.S. at 140-141):

> Title IV sets up a statutory scheme governing the election of union officers, * * * attempting to guarantee fair union elections in which all the members are allowed to participate. Section 402 of Title IV, as has been pointed out, sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court.

> It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. * * * Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

In *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 473, and its companion case, *Wirtz* v. *Local Union 125, Laborers' International Union*, 389 U.S. 477, 482, the Court reiterated that "Congress deliberately gave exclusive enforcement authority to the Secretary," noting that "Congress rejected other proposals, among them plans that would have authorized suits by complaining members in their own right" (389 U.S. at 473).

In *Hodgson v. Local Union 6799, United Steelworkers of America*, 403 U.S. 333, the Court construed the "exhaustion of remedies" requirement of Section 402 to limit the scope of the Secretary's enforcement authority under Title IV. The Court held that the Secretary could not seek to invalidate an election upon a ground not protested internally by a union member, and supported this conclusion by observing that congressional recognition of "the need to eliminate election abuses" was coupled with "a desire to avoid unnecessary governmental intervention" and "unnecessary expenditure of the limited

resources of the Secretary of Labor." 403 U.S. at 339.

Most recently, *Trbovich* v. *United Mine Workers*, *supra*, reconciled the exclusive enforcement authority vested in the Secretary with the special role and function of the complaining member who activates the enforcement machinery of Title IV. The Court there held that such complainants are entitled to intervene in litigation already initiated by the Secretary, because such intervention would neither "subject the union to burdensome multiple litigation, nor * * * compel the union to respond to a new and potentially groundless suit." 404 U.S. at 536. However, because Congress intended "to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary" (*id.* at 537), the Court rejected the complainant's contention that he should be permitted as an intervenor to litigate issues that the Secretary had not seen fit to include in his complaint. That, the Court ruled, "would be to circumvent the screening function assigned by statute to the Secretary." *Ibid.* The Secretary's discretion thus was held to be conclusive, precluding judicial review of the issues he did not deem meritorious.

D. The Entertainment Of Suits To Compel The Secretary To Bring Suit Would Be Contrary To The Policies Of Title IV's Remedial Provisions.

Respondent seeks to circumvent the Secretary's exclusive authority to enforce Title IV by respecting the form but not the substance of that authority. It

is literally true that, if respondent were to prevail against the Secretary, it would be the Secretary rather than the union member who would then bring suit to set aside the union election. But such "interfere[nce] with the screening and centralizing functions of the Secretary" (*Trbovich*, *supra*, 404 U.S. at 533) would transfer to the courts a substantial part of the screening role intended for the Secretary, with attendant consequences that would be contrary to the important statutory purposes served by the remedial provisions of Title IV.

After analyzing the legislative history of Title IV, this Court concluded in *Trbovich* that

> Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. [404 U.S. at 532.]

The Court recognized that, in order not to subject unions to the burdens of being haled into court to answer even the most petty post-election complaints, Congress had interposed the Secretary, who is disinterested and unaffected by the daily swirl of emotion and infighting that accompanies election disputes, between the union and its members to screen post-election complaints. In so doing, Congress desired to reduce to a minimum disruption of union self-government based on mere personal involvement

of the union members and to substitute the more dispassionate judgment and broader perspective of the Secretary in pursuing the public interest in the conduct of particular elections in a democratic manner. By making the Secretary the sole judge of the adequacy of post-election complaints, Title IV was "intended to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary" (*Trbovich, supra,* 404 U.S. at 537).

The Secretary's screening role was intended to protect the unions both from post-election complaints without substance (which represent litle more than an attempt to continue through the judicial system the infighting that preceded the election) and from unnecessary interference in union affairs, in keeping with the Act's basic purpose—which was to improve, rather than replace, union self-government. Indeed, when Senator Kennedy introduced the bill, he described it as a "modest proposal" that would protect union members "without undue interference in the internal affairs of what I believe are essentially private institutions * * *." 104 Cong. Rec. 7954.

If judicial review of the Secretary's screening function were available, the unions effectively would be subject to post-election private lawsuits untested by a neutral monitor. Such lawsuits, although less burdensome to a union than the direct private action barred in *Calhoon, supra,* would be significantly more burdensome than raising a new issue in a prosecution already commenced by the Secretary, which was pre-

cluded by *Trbovich*. The union could be (as it was in this case) named as a defendant in the suit nominally against the Secretary; it could thus be "haled into court, virtually without limitation" (Hearings, *supra*, at p. 567). And, even if not named a defendant in the complaint, the union would need to defend the suit as an intervenor or *amicus* since it, as well as the Secretary, is a real party in interest; if the Secretary is ordered to commence a Title IV suit, the union must defend its election. The Secretary and the union, in defense of an action such as the present one, would have to offer proof not only of the propriety of the Secretary's investigative and decision-making techniques, but also of the conduct of the election that is the source of the underlying dispute.

Because the Federal Rules of Civil Procedure require a trial for all but obviously specious complaints, most complaints against the Secretary and the union would be likely to result in at least a short trial—the merits of a complaint turning on a detailed factual analysis of a complex election rarely are evident on the pleadings. Union resources (and those of the Secretary) would be diverted to the defense of the suit. And, although the union and the Secretary ultimately might persuade the district court that the Secretary did not abuse his discretion, the union would have been put to the task of defense, and its election would have been cast into doubt. The consequences would thus be substantially similar to those Congress sought to avoid by precluding private suits challenging the outcome of the election.

The entertainment of suits against the Secretary also would result in the possibility of multiple litigation over a single election, contrary to the congressional purpose to centralize in one forum all of the complaints about the conduct of an election in order to minimize the chance of multiple suits against the union and the possibility of conflicting results. Under the court of appeals' holding, more than one dissatisfied member presumably could bring suit against the Secretary concerning the same election, and these suits could proceed simultaneously before different judges. The Secretary and the union would be obliged to defend in each suit; one district court might compel the Secretary to prosecute, while another decided that the Secretary's actions were correct. Even in the absence of a multiplicity of suits a two-part series (member versus Secretary and union, followed by Secretary plus member as intervenor versus union) would be necessary whenever the member's complaint against the Secretary is successful. The evidence in the two suits would, of course, be similar, resulting in unfortunate duplication of judicial effort.

At least two additional policies of Title IV would be impaired by the availability of judicial review of the Secretary's decision not to bring suit. Permitting the loser of the election to seek to compel the Secretary to sue would substantially weaken the Secretary's ability to settle disputes concerning union elections. The exclusive right to enforce Title IV was placed in the hands of the Secretary in part to promote such settlements, which are more advantageous

than litigation because they may be achieved more swiftly and because, as voluntary acts, they are less intrusive into the union's affairs. See *Calhoon, supra,* 379 U.S. at 140; *Bottle Blowers, supra,* 389 U.S. at 471. Success in efforts to settle such cases often depends, however, on the Secretary's ability to assure the union that the settlement would resolve all disputes concerning the election, and that the bargain he strikes in settlement will be binding. Obviously the Secretary could not give this assurance if he could be compelled subsequently to prosecute against his will.

Finally, Title IV includes, as an integral part of the legislative program, a timetable providing for rapid action. Most union elections are held every three years. If disputes are not settled rapidly, union officers may operate under a cloud for a substantial part of their terms. Accordingly, Section 402 of the Act allows the Secretary only 60 days after he receives the complaint to investigate and, if necessary, to institute suit. This time limitation serves both the function of minimizing intrusion into union internal affairs [7] and the function of resolving as quickly as possible any cloud upon the office holders.[8]

By operating within the statutory timetables the Secretary often is able to provide prompt relief (if

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[7] See *Calhoon, supra,* 379 U.S. at 140; *Bottle Blowers, supra,* 389 U.S. at 471; *Hodgson* v. *Local 6799, United Steelworkers, supra,* 403 U.S. at 338-339; *Trbovich, supra,* 404 U.S. at 532-533, 534-535.

[8] As the Senate reports stated, "time is of the essence" in election disputes. S. Rep. No. 1684, *supra,* at p. 13; S. Rep. No. 187, *supra,* at p. 21.

possible by settling the dispute without resort to judicial proceedings). The more swift the remedy, the greater its effect in ensuring free and democratic elections and their attendant benefits to the membership and the public at large. On the other hand, any complaint by a member about the conduct of the election will cast into doubt the legitimacy of the election and of the propriety of the service of the incumbent; that cloud can be dispelled by the Secretary's decision not to file an action.[9] Allowing suits to compel the Secretary to sue would prevent either of these resolutions. The member's suit against the Secretary and the union would create a cloud on the office but prevent the resolution of the underlying dispute, for the Secretary's decision not to prosecute would not bring matters to an end. The cloud would continue until the district court, perhaps some time later, disposed of the complaint. Should the court require the Secretary to commence an action against the union, this challenge would come long after the election and well beyond the 60 day limit.[10] Thus, no matter which way

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[9] This is, of course, a basic difference between pre-election actions under Title I, which may be brought by any member, and post-election actions under Title IV.

[10] Although the Secretary may (and did in this case) obtain the union's consent to extend the 60-day period in order to allow him to continue his investigation or conclude settlement negotiations (*Hodgson* v. *Lodge 851, Int. Assn. of Mach. & Aerospace Workers*, 454 F.2d 545 (C.A. 7); *Hodgson* v. *International Printing Press. & Assist. Union*, 440 F.2d 1113 (C.A. 6), certiorari denied, 404 U.S. 828), this is not inconsistent with the Act's emphasis on expeditious resolution of election disputes. The extension procedure allows the Secre-

the district court decides the member's suit against the Secretary, the emphasis in Title IV on prompt resolution of election disputes would be frustrated.

E. The Secretary Is Entitled To The Usual Scope Of Prosecutorial Discretion.

As previously discussed, the legislative history and this Court's decisions show the importance of the Secretary's role, under Title IV, as the sole prosecutor of complaints concerning completed elections. As the prosecutor of these complaints the Secretary is entitled to the usual scope of prosecutorial discretion.[11]

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tary to come to more informed judgments on the merits and avoid suits that are not meritorious. Moreover, it allows the parties to engage in additional negotiations that might avert the need to bring any action. Both reasons for extension advance the policies underlying Title IV. Similarly, the courts have permitted the Secretary to bring suit after the 60 days have expired if the union has impeded his investigation. See, *e.g.*, *Wirtz* v. *Local Union 1622*, 285 F. Supp. 455 (N.D. Calif.); *Wirtz* v. *Independent Workers Union*, 65 LRRM 2104 (M.D. Fla.); *Wirtz* v. *Great Lakes District Local 47*, 240 F. Supp. 859 (N.D. Ohio). To some extent the 60-day limitation period is for the benefit of the union itself, and its benefits may therefore be waived by agreement or obstruction.

[11] The two other courts of appeals that have considered the scope of the Secretary's discretion have concluded that he has unreviewable authority to decide which claims are deserving of prosecution. *Howard* v. *Hodgson*, 490 F.2d 1194 (C.A. 8); *Brennan* v. *Silvergate District Lodge No. 50*, 503 F.2d 800 (C.A. 9). The majority of district courts are in agreement. See *McArthy* v. *Wirtz*, 65 LRRM 2411 (E.D. Mo.); *Morrissey* v. *Shultz*, 311 F. Supp. 744 (S.D.N.Y.); *Altman* v. *Wirtz*, 56 LRRM 2651 (D.D.C.); *Katrinic* v. *Wirtz*, 62

Title IV is comparable to other statutes that simultaneously set up a program and establish an exclusive method for their enforcement. For example, in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, petitioners sought unsuccessfully to challenge a certification of representatives by the National Mediation Board under the Railway Labor Act. The Court held there was no jurisdiction because the statutory right was to be enforced exclusively through the statutory remedy.[12] In language that is equally applicable here, the Court explained (320 U.S. at 301):

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. * * * All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.

LRRM 2557 (D.D.C.); *Ravaschieri* v. *Shultz*, 75 LRRM 2272 (S.D.N.Y.). Contra, *Schonfeld* v. *Wirtz*, 258 F. Supp. 705 (S.D.N.Y.). Middle ground has been taken in *DeVito* v. *Shultz*, 300 F. Supp. 381 (D.D.C.) (Secretary ordered to give full statement of reasons; after submission of reasons suit dismissed, 72 LRRM 2682); and *Valenta* v. *Brennan*, No. C74-11 (N.D. Ohio, decided July 3, 1974) (statement of reasons required).

[12] See *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650. Cf. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (statute vesting enforcement in administrative agency excludes private right of action).

Similarly, the General Counsel of the National Labor Relations Board has unreviewable discretion to refrain from filing a complaint with the Board. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (citing *United Electrical Contractors Association* v. *Ordman*, 366 F.2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026). The Secretary's role in deciding whether to prosecute an action under Title IV is similar to the role of the Board's General Counsel—in either case the prosecutor must determine whether there is probable cause to believe that a violation has occurred and, if so, whether it warrants adjudication.[13] The Secretary's role is discretionary, not ministerial. His function was explained in the Senate Report as follows:

> The Secretary is directed to investigate [any member's] complaint and determine whether there is probable cause to believe that an election was not held in conformity with the requirements of the bill. Since an election is not to be set aside for technical violations but only if there is reason to believe that the violation has probably affected the outcome of the election,

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[13] See *Wirtz* v. *Local Union No. 125, Laborers', supra*, 389 U.S. at 483 (noting similarity between enforcement of Title IV and enforcement of NLRA).

This similarity between the roles of the Secretary and the General Counsel in prosecuting cases based on the complaint of a union member also is shown by the similar way in which the complainant can intervene, but only after the public prosecutor has begun his action, and then only with respect to issues prosecuted by the Secretary or the General Counsel. Compare *Trbovich, supra*, with *Auto Workers* v. *Scofield*, 382 U.S. 205.

> the Secretary would not file a complaint unless there were also probable cause to believe that this condition was satisfied. [S.Rep. No. 187, *supra*, at p. 21.]

Other administrative agencies have been accorded similar discretion to prosecute, or decline to prosecute, alleged violations of the statutes they enforce. See, *e.g.*, *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25. *Vaca* v. *Sipes*, *Klesner*, and *Switchmen's Union*, and the position we take in this case all are in accord with the general rule that one charged with the task of prosecuting violations of a statute possesses both the discretion to prosecute and the discretion to refrain from doing so. In the absence of a constitutional violation, a prosecutor's exercise of that discretion is not subject to a judicial review.

For example, in *The Confiscation Cases*, 7 Wall. 454, the Court held that the Attorney General was at liberty to discontinue a civil action to confiscate a vessel, even though its successful prosecution would have produced substantial benefit for an informant, who could collect one-half the value of the seized vessel. In *Georgia* v. *Mitchell*, 450 F. 2d 1317 (C.A. D.C.), the court declined to entertain a challenge to the Attorney General's pattern of prosecutions to compel elimination of segregation in southern schools. See also *Powell* v. *Katzenbach*, 359 F. 2d 234 (C.A. D.C.) (collecting cases), certiorari denied, 384 U.S. 906; *Peek* v. *Mitchell*, 419 F. 2d 575 (C.A. 6). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614.

There is no meaningful difference between the Secretary's role in enforcing Title IV and the role of other prosecutors whose discretion has been sustained.[14] In every case the prosecutor has been invested with authority to sue, often on an exclusive basis. Where, as here, the statute confers exclusive prosecutorial authority, the substantive rights created by the statute are conditioned accordingly. See *Switchmen's Union, supra.* And whether or not public prosecution is the sole remedy, the prosecutor must be able to control his prosecutorial decisions in order to formulate and coordinate a coherent program of prosecutions.[15] He must allocate his limited resources between the investigation function and the prosecution function and, within those categories, formulate priorities of prosecution. If there are more potentially meritorious cases than there are resources to investigate and prosecute them fully, the prosecutor should be free to allocate his prosecution resources to the cases that will produce the most benefit for the public, rather than to those in which someone seeks to compel him to prosecute. In administering Title IV, the Secretary is able to make these judgments in light of his perspective into budgetary and personnel limitations and in light of his accumulated

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[14] Nor is there any indication that Congress intended a more constricted scope of prosecutorial discretion for the Secretary than is vested in other prosecutors similarly situated.

[15] Cf. Posner, *The Behavior of Administrative Agencies*, 1 J. Legal Studies 305 (1972).

experience with prosecutions across the country. It is on the basis of these perspectives—which of course are not fully shared by either an individual complainant or a court—that the Secretary is to evaluate the prospects of success for a prosecution, and to weigh that probable public benefit from a particular success in light of the necessary commitment of resources. And it is the Secretary who is politically answerable for the administration of his prosecutorial program. There is, in sum, substantial support, in policy as well as in precedent, for according to the Secretary a scope of prosecutorial discretion comparable to that of other agencies.

The court of appeals attempted to distinguish the cases supporting prosecutorial discretion by asserting that, in those cases, the prosecutor protected only the public interest, whereas under Title IV the Secretary protects the individual interests of the complaining member (Pet. App. A, pp. 13A-15A). If anything, however, the reverse is true. In *The Confiscation Cases* the Attorney General's suit to confiscate the vessel was unmistakably for the benefit of the informer, who was entitled by statute to receive one-half of the value of any confiscated vessel. Similarly, an employee who complains to the General Counsel of the National Labor Relations Board, if vindicated in an unfair labor practice proceeding, may collect substantial back pay remedies or other benefits. The stake of the complainants in such cases is thus more immediate than that of a complaining member in a Title IV case, who at most can hope that the old

election will be nullified and a new election held, but who even then would have only an opportunity to run, not a guarantee of success.

In any event, the policy of the LMRDA, as expressed in its preamble (29 U.S.C. 401), is not to bestow benefits on individual complainants, but to vindicate the interest of the membership in democratic procedures and of the public at large in labor peace. Under Title IV "Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Bottle Blowers, supra*, 389 U.S. at 475.[16] The Secretary should be allowed to vindicate this "vital public interest" free of challenge by members whose "narrower interest" may adversely affect the performance of his duties and hamper the attainment of Title IV's objectives.

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[16] Indeed, in *Trbovich, supra*, the Court's predominant rationale for allowing intervention by a union member was the recognition that suit by the Secretary protects public (not private) interests, and that the former may conflict with the latter.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1975.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73 0954

WALTER BACHOWSKI, PLAINTIFF

v.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, DEFENDANTS

STATEMENT OF THE SECRETARY OF LABOR

On November 12, 1973, this Court, upon oral argument, dismissed the Complaint filed herein by the plaintiff, and further denied plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. On appeal, the United States Court of Appeals for the Third Circuit, in a Judgment entered on July 26, 1974, ordered that the aforementioned Judgment of the District Court be vacated and the cause remanded for further proceedings consistent with the Opinion of the Third Circuit filed on July 26, 1974, as amended September 3, 1974.

On remand, this Court ordered the Secretary of Labor to furnish a statement of the reasons and explanations underlying his decision not to file suit pursuant to the complaint received from Mr. Walter Bachowski, a member in good standing of the United

Steelworkers of America, AFL-CIO-CLC (hereinafter referred to as the International).

Accordingly, defendant, Secretary of Labor, is furnishing the following information. However, it is respectfully submitted that defendant, Secretary of Labor, in furnishing this statement does not waive any legal claims raised in connection with this matter.[1]

Pursuant to a complaint received on June 21, 1973 from Mr. Walter Bachowski, the Secretary of Labor conducted an investigation of the February 13, 1973 election conducted by the International for the office of District Director, District 20. District 20 is the fourth largest Steelworker District and covers eight contiguous counties in Western Pennsylvania, running from Pittsburgh in the South to Erie in the North, and Ohio to the West. At the time of the election, District 20 was comprised of approximately 67,419 members.

In total, the Secretary's representatives investigated 80 of District 20's 190 local unions, including all 27 of the former District 50 locals (the Secretary has found from past experience that former District 50 locals have encountered an unusual number of election related problems due to their recent assimilation into the Union). In formulating an investigative plan the Department of Labor focused upon and investigated each and every local brought to its at-

[1] Defendant, Secretary of Labor, now has pending before the Supreme Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

tention by Mr. Bachowski, both orally and in his written complaint. Investigators, while in the geographical areas of the locals designated by Mr. Bachowski, reviewed additional local unions on a random basis in those areas. Also, red flag locals were selected on a district wide basis where, for example, voter turnouts appeared to be inordinately high. In addition to the 80 in depth local union investigations, investigators interviewed numerous individuals including members, union officers and Mr. Bachowski himself concerning the events surrounding the District 20 election. Investigators also reviewed and examined documentary evidence for further investigative leads or potential violations. During the course of the entire proceeding, investigators worked hand in hand with Mr. Bachowski on an ongoing basis.

Because of the size of District 20 and the obvious limitations on available manpower (the Department of Labor was concurrently investigating elections conducted in five other Districts as well), it was not possible to investigate each and every local union in District 20. However, the above described investigative design was broadly conceived and was reasonably calculated to disclose all violations which may have occurred in the District wide election.

Therefore, it is readily apparent the Department conducted a thorough and exhaustive investigation into the District 20 election. Set forth below is a detailed analysis of the investigative findings, along with the numerical estimates of the votes which may

have been affected as a result of these violations. In reaching these numerical estimates, we have not considered figures which constitute a reasonably probable effect, but rather, will set forth votes which have been calculated to a maximum theoretical possibility. By using these maximized figures, we are giving in most instances the benefit of the doubt to Mr. Bachowski. For example, Local Union 2789 which will be discussed herein failed to conduct an election. Thus, by assuming that the entire membership of 249 would have voted, and moreover would have voted unanimously for Mr. Bachowski, we arrived at the maximized figure for possible effect on outcome of 249 votes. This method of computation, while theoretically possible, is highly unlikely, since, for example, in the entire District only about one-third of the members voted in the election. Thus, the reasonable probability in this Local Union is that only approximately one-third of the members would have voted had there been an election, and that those voting would not have given Mr. Bachowski an unanimity of the vote.

(1) *Local Union 2203*

The investigation in this Local Union disclosed a failure to mail a notice of the election to ten members working on one employer site, and consequently, they were never apprised of the election and did not vote. Thus, ten members were potentially denied the right to vote in this Local Union as a result of the

failure to mail notice of the election as required by Section 401(e) of the Act. In arriving at this figure of ten, we would note, however, that since only nine of the seventeen members at the other employer location voted, it seems highly unlikely that all ten members would have voted in the election had they been notified.

(2) *Local Union 2789*

The files indicate that Local Union 2789 voted at its monthly membership meeting not to conduct an election because of a lack of funds. Accordingly, no election was conducted. However, since the Local Union was obligated by law to conduct an election, it was concluded that the total membership of 249 were potentially denied the right to vote in violation of Section 401(a) of the Act. As noted above, in computing the total number of votes that may have been affected by this violation, we have included the entire membership of the Local Union, and have further assumed that the entire membership may have voted for Mr. Bachowski.

(3) *Local Union 3186*

This Local Union failed to provide adequate safeguards to insure a fair election. For example, the persons conducting the election hand-carried ballots to members at their work stations, who were then permitted to vote. There was no specific voting area and no voter eligibility list was used. The entire

conduct of this election left a great deal to be desired. It was thus concluded that the Local Union failed to provide adequate safeguards to insure a fair election and that this violation "may have affected the outcome" of the election to the extent of 16 votes. This figure of 16 votes represents the entire margin by which Kluz prevailed over Bachowski.

(4) *Local Union 3713*

The investigation of this Local Union disclosed very loose ballot control (many ballots were found lying around the grounds of the employer), and as a result the Local was unable to account for 39 ballots. The union thus failed to provide adequate safeguards to insure a fair election and this violation "may have affected" 124 votes. This figure, as in the previous Local, represents the full margin of victory by Kluz over Bachowski.

(5) *Local Union 7496*

This Local Union, which is comprised of six members, failed to conduct an election. Our investigation disclosed that these members were eligible to vote in the election and thus, the six members were denied the right to vote in violation of Section 401(e) of the Act. For purposes of possible effect on outcome, it is assumed that all six members would have voted had an election been conducted and that all six members would have voted for Bachowski.

(6) *Local Union 7749*

This Local Union, consisting of 25 members, failed to schedule and conduct an election. Although there appeared to be voter apathy in this Local Union, it was concluded that these 25 members had been denied the right to vote. Hence, the figure of 25 was assigned as the potential "effect on the outcome."

(7) *Local Union 12055*

The 51 members of this Local Union work at four separate employer locations. The investigative files indicated that 38 members at three of those sites were not notified of the election in violation of Section 401(e) of the Act. In addition, the investigation disclosed that ballots were distributed and received in such a manner that secrecy could not be maintained. All 13 members voting at this location cast their ballots in favor of Kluz and thus it was considered that these 13 ballots may have been affected as a result of this violation. Thus, in this Local Union, a total potential effect on outcome of 51 votes was derived by assuming that the 38 members not notified would all have voted and cast their ballots in favor of Bachowski, and that the 13 members were influenced by the non-secret conditions to vote for Kluz.

(8) *Local Union 12059*

This Local Union consists of approximately 185 members employed at two separate locations. The

investigation revealed that nine members at one of these locations were not mailed notices of the election as required. The file further revealed that these members were in fact eligible to vote. Thus, it was concluded that the outcome of this election may potentially have been affected to the extent of eight votes as a result of this violation, since one of the nine members who was not notified of the election actually voted.

(9) *Local Union 13972*

The investigative file disclosed that five members of this Local Union who were working at a plant site removed from the remainder of the local members were denied an opportunity to vote in this election. The files disclosed that the Election Committee failed to provide facilities for these members. Thus, five votes may have been affected by the violation in this Local Union.

(10) *Local Union 14210*

A review of the investigative file in this Local Union disclosed two violations. The evidence indicated that one member was denied the right to vote; the Local failed to provide voting facilities for a member who was unable to reach the polls because of a work conflict. In addition, the evidence indicated that an ineligible member was permitted to vote in violation of Section 401(e) of the Act. Thus, two members were potentially affected by the violations that occurred in this Local Union.

(11) *Local Union 14661*

In this Local Union, the investigation revealed that certain members marked their ballots in such proximity to the registration table that secrecy of the ballot may have been compromised. The investigation also revealed evidence that one member saw how another member voted. The result in this election was Kluz 34, Bachowski 20, and Brummitt 11. The possible effect on outcome was 14, the margin of victory by Kluz over Bachowski.

(12) *Local Union 14768*

The files reveal that although an election was conducted in this Local Union, no return sheet was submitted to the International. The evidence indicated that because the Financial Secretary thought he had not conducted the election properly, he destroyed all records and did not submit a return. Thus, the 17 members casting ballots in this election were denied a right to vote in violation of Section 401(e) of the Act. (It should be noted that the union purports to have evidence of the actual return in this Local Union, which showed Kluz winning by one vote.)

(13) *Local Union 14800*

A review of the investigative files on Local 14800 revealed the existence of three violations. The evidence very strongly indicated that the local failed to provide adequate safeguards to insure a fair election in violation of Section 401(c) of the Act.

There was evidence that ballots were submitted for some 40 members who did not in fact vote in the election. Moreover, individuals other than election tellers had access to and handled ballots without adequate supervision. In view of the lack of adequate ballot control and the strong indication of ballot fraud in this Local Union, it was concluded by the Secretary that all 110 votes received by Kluz should be considered as possibly having been affected by this violation. (118 votes were cast in the election with Bachowski receiving 3 and Brummitt receiving 5.) The evidence also indicated that 78 members at three employer locations were not adequately notified of the election in violation of Section 401(e) of the Act. Since 38 of these members voted, only 40 members may be considered for purposes of effect on outcome (the 38 who voted were included in the figure of 110 above). Finally, the file disclosed that funds of Local Union 14800 were expended for a campaign rally supporting the candidacy of Mr. Kluz. Evidence tends to indicate that 50 to 100 members attended the party, including some officers and members of locals other than 14800. Thus, using maximized figures, 100 votes may have been affected by this violation (in addition to the total number of members already included above). However, we would note that the union has indicated that many members attending this party were ardent Kluz supporters. Thus, the illegal expenditure would have had little effect, if any, on their voting preference. We were unable to identify the majority of the members

of the party; the union contends that most of the members in attendance were members of Local Union 14800, whose entire vote was regarded as possibly affected by other violations as noted above.

(14) *Local Union 14820*

The investigative file in this Local Union indicated that there was a failure to maintain secrecy of the ballot in violation of Section 401(a) of the Act, as well as a failure to adequately notify members of the election in violation of Section 401(e) of the Act. The investigation disclosed that 22 ballots cast in this election were signed on the back by the voting member—an obvious violation of secrecy. Although officers of the Local claim they were not aware of this until a subsequent review of the ballots with a Department of Labor investigator, this does not cancel the violation, which may have affected 22 votes. The evidence also indicated 39 members at two employer sites were not notified of the election. Assuming that all 39 would have voted and that they would have cast their votes for Bachowski, 39 votes may have been affected by this violation. Finally, the file disclosed that through inaccurate tallies by the responsible local union officers, Bachowski received one less vote than his entitlement while Kluz received one additional vote. Hence, an extra two votes must be considered as having been affected by the Local's failure to properly credit the votes to the proper candidates.

(15) *Local Union 14945*

The investigative file in this Local Union revealed that ballots were marked on tables by voters in close proximity who were able to observe how other members were voting their ballots. Thus, the Local failed to observe secrecy of the ballot as required by Section 401(c) of the Act. Since the margin of victory by Kluz over Bachowski was 18, 18 votes may have been affected by the existence of this violation.

(16) *Local Union 15370*

This Local Union failed to provide adequate safeguards to insure a fair election in that the ballot control was less than desirable. Persons not authorized handled ballots at one or more times throughout the period of the election. Although additional investigation failed to disclose any evidence that would indicate other irregularities such as fraud or ineligible members voting, it was nevertheless concluded that this lack of adequate safeguards may have affected ten members in this local—the margin of votes achieved by Kluz over Bachowski.

(17) *Local Union 15420*

Evidence disclosed that this Local Union failed to maintain adequate safeguards to insure a fair election. Union records indicated that Kluz received 15 votes, Bachowski none, and Brummitt one. However, the Secretary's investigation revealed that only 13 members were listed as voting. It was also learned

that this local did not maintain adequate control of the ballots a fact which may in no small part account for the deviation between the number of votes indicated as having been cast and the number of members actually voting. Thus, the Secretary of Labor concluded that all 16 members voting in this election may have been affected by the local's failure to provide adequate safeguards to insure a fair election.

To recapitulate, we are setting forth below a list of the Locals in which violations occurred and the votes which may potentially have been calculated to a theoretical probability and represent the maximum number of votes involved.

1. Local Union 2203 — 10 votes
2. Local Union 2789 —249 votes
3. Local Union 3186 — 16 votes
4. Local Union 3713 —124 votes
5. Local Union 7496 — 6 votes
6. Local Union 7749 — 25 votes
7. Local Union 12055— 51 votes
8. Local Union 12059— 8 votes
9. Local Union 13972— 5 votes
10. Local Union 14210— 2 votes
11. Local Union 14661— 14 votes
12. Local Union 14768— 17 votes
13. Local Union 14800—250 votes
14. Local Union 14820— 63 votes
15. Local Union 14945— 18 votes
16. Local Union 15370— 10 votes
17. Local Union 15420— 16 votes

By adding the total of the votes set forth in the local unions above, the election for the position of District Director, District 20, may theoretically have been affected by violations disclosed through investigation to the extent of 884 votes. Since the margin of victory by which Mr. Kluz prevailed over Mr. Bachowski was 907 votes[2] it was the Secretary of Labor's conclusion that the violations which occurred could not have affected the outcome of the election. Moreover, we would note the Secretary like any other litigant must be cognizant of all factors entering into prosecution of a Title IV case. In this regard, the union has raised serious question concerning Bachowski's invocation of his internal union remedies, notably his failure to carry a complaint to the International Tellers whose function is to rule initially upon the validity of election protests. Mr. Bachowski chose to bypass this step and to carry his protest directly to the Executive Board.

The plaintiff has correctly alleged in this complaint and the Secretary has confirmed through investigation, that certain violations of Title IV occurred in the election for District Director for District 20. However, the Secretary concluded, after review of the investigative findings that the votes which may have been affected by the violations could not have altered the outcome of the election. In *Wirtz* v. *Local 153*,

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[2] The results in the election for the position of District Director, District 20 were as follows: Kluz—10,558 votes; Bachowski—9,651 votes; Brummitt—3,566 votes.

Glass Bottle Blowers Association, 389 U.S. 463 (1968) the Supreme Court noted at page 427 that:

> The Secretary may not initiate an action until his own investigation confirms that a violation of section 401 *probably infected* the challenged election. (Emphasis added).

Thus, the finding of violations by the Secretary of Labor does not mature into an actionable case unless he has evidence that such violations "probably infected" the election in question. In this case, the Secretary found violations, but concluded that they did not affect the outcome of the election.

CONCLUSION

The extensive investigation conducted by the Department of Labor focused, among other things, on all the specific matters raised by Mr. Bachowski. As has been shown above, certain violations were disclosed in the conduct of this election, however, these violations could not have affected its outcome. Therefore, it is submitted that the Secretary of Labor in arriving at his determination not to file suit to set aside the District 20 election properly discharged his statutory duties under Title IV of the Act.

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